

STEPHEN D. ANDERSON  
sanderson@andersonkreiger.com

October 27, 2004

Acton Board of Selectmen  
Town Hall  
472 Main Street  
Acton, MA 01720

RE:	Subject:	Request for Chapter 268A Determination
	Municipalities:	Town of Acton and City of Cambridge
	<u>Proceedings:</u>	<u>W.R. Grace &amp; Co. and Affiliates' Chapter 11 Proceedings</u>

Dear Members of the Board:

With the Town's knowledge and consent, for a number of years, this firm has represented the Town of Acton and the City of Cambridge on separate, unrelated matters relating to W.R. Grace & Co. and/or its affiliates (collectively "Grace") arising, respectively, out of separate tracts of land which Grace has owned and operated in Acton and Cambridge. The Acton matters relate to sewer betterment assessments; the Cambridge matter relates to a multi-party environmental dispute. Under the State Ethics Act, I am writing to request that the Board of Selectmen make the determinations set forth below.

### **The Grace Bankruptcy**

After Acton and Cambridge separately received Notice of Commencement of Chapter 11 Bankruptcy Cases Nos. 01-1139 through 01-1200 from the United States Bankruptcy Court for the District of Delaware, involving W.R. Grace & Co. and approximately 61 of its affiliated entities,<sup>1</sup> Acton and Cambridge retained separate bankruptcy counsel and filed their respective

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<sup>1</sup> The Debtors in these consolidated proceedings, which are being jointly administered by the Bankruptcy Court in Delaware, include W.R. Grace & Co. (formerly Grace Specialty Chemicals, Inc.), W.R. Grace & Co. - Conn., Dewey and Almy, LLC (formerly Dewey and Almy Company), and W.R. Grace Land Corporation, which may have had involvement in matters in Acton and Cambridge over the years.

Proofs of Claim with the Bankruptcy Court.<sup>2</sup> Anderson & Kreiger LLP continued to represent Acton with respect to its sewer betterment issues and Cambridge with respect to its underlying environmental matter.

Recently both Acton and Cambridge have had occasion to file pleadings in the Grace Bankruptcy. Acton's pleading seeks relief from the automatic stay to proceed with final sewer betterments. Cambridge's pleading opposes Grace's objection to its Proof of Claim. Both Acton and Cambridge have asked lawyers from Anderson & Kreiger LLP (Jeff Roelofs and myself) to move for permission to appear *pro hac vice* in the Delaware Bankruptcy Court to assist their respective bankruptcy counsel in presenting their respective positions.

### **Requested Determinations**

In light of this, under the State Ethics Act, I am writing to request that the Board of Selectmen determine that (a) our appearance *pro hac vice* for the Town in the Bankruptcy Court is necessary for the proper discharge of our official duties as Town Counsel, (b) the interest of the Town in the Grace proceedings requires our participation in the upcoming hearing and otherwise to provide assistance to bankruptcy counsel as to matters of Massachusetts sewer betterment law, (c) this firm's concurrent analogous representation of Acton and Cambridge are in no way inconsistent and do not involve the same "particular matter" within the meaning of Section 17 (particularly as both the Town and the City have separate bankruptcy counsel specifically to advise them as to matters involving the Grace bankruptcy), (d) the foregoing circumstances are not so substantial as to be deemed likely to affect the integrity of the services which the Town may expect from Anderson & Kreiger LLP as to sewer betterment matters involving Grace (or any other person), and (e) these circumstances should not cause a reasonable person, having knowledge of the relevant circumstances, to conclude that Cambridge can improperly influence us or unduly enjoy our favor in the performance of our official duties for Acton, or that we are likely to act or fail to act for Acton as a result of rank, position or undue influence by Cambridge.

### **Pertinent Facts**

In making these determinations, the Board may consider the following facts pertinent:

Acton and Cambridge require legal representation on two separate, unrelated matters relating to Grace's land in Acton and Cambridge:

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<sup>2</sup> Acton retained the services of bankruptcy counsel Thomas O. Bean, Nutter, McClennen & Fish, LLP, World Trade Center West, 155 Seaport Boulevard, Boston, MA 02210-2604. Cambridge retained the services of bankruptcy counsel Kevin J. Mangan, Walsh, Monzach and Monaco, P.A., 400 Commerce Center, P.O. Box 2031, Wilmington DE 19899.

1. Since 1998, this firm has represented Cambridge with respect to contamination of real property owned by the City in North Cambridge which is used for public recreation purposes and is known as the Russell Field Property.<sup>3</sup> Grace has owned and operated manufacturing facilities on land abutting the Russell Field Property, including without limitation 36-64 Whittemore Avenue, Cambridge, and has released oil or hazardous materials at and from that site. Prior to Grace commencing Chapter 11 Proceedings, Grace entered into a Standstill Agreement with Cambridge on June 5, 1998, pertaining to potential claims relating to such releases. Since that time, Cambridge has performed extensive investigations and remediation of the Russell Field Property and has kept Grace informed of those activities. In light of the Chapter 11 Proceedings, Cambridge has filed a claim with the Bankruptcy Court pursuant to M.G.L. c. 21E and related statutory, regulatory and common law authority against Grace and any of its predecessors, successors and affiliated entities that have owned or operated the Grace property abutting the Russell Field Property and that are responsible for any release at or from Grace's property. Cambridge is also pursuing its claims against other potentially responsible parties ("PRPs") for the Russell Field contamination.<sup>4</sup>
2. As Town Counsel and Special Town Counsel, this Firm, has represented Acton on a wide range of municipal matters, including various legal matters pertaining to Acton's ongoing Middle Fort Pond Brook Sewer Project. Acton has assessed sewer betterments on various landowners in Acton relating to that sewer project. Grace owns various parcels in Acton, some of which have been assessed sewer betterments. In an action filed in Middlesex Superior Court and on appeal to the Massachusetts Appeals Court, Grace contests the sewer betterment assessed against its Acton land. In light of the Chapter 11 Proceedings, Acton has filed a claim with the Bankruptcy Court to protect its interest in the sewer betterment assessed against Grace, and recently has sought permission of the Court to proceed with final sewer betterments.

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<sup>3</sup> The Russell Field Property is a City-owned park located on and in the vicinity of Rindge Avenue, Alewife Brook Parkway, Harvey Street and Clifton Street. The Russell Field Property consists of two baseball fields, a football field, a soccer field, a running track, public access walkways, and landscaped areas. It is bordered to the north and west by property owned by W.R. Grace, to the south by Rindge Avenue and a Metropolitan District Commission (MDC) swimming pool, and to the east by Clifton Street residences.

<sup>4</sup> On August 4, 1998, the City served a release notification and demand letter, pursuant to MGL c. 21E, § 4A, on the MBTA. On October 27, 1998, the City served a release notification and demand letter, pursuant to MGL c. 21E, § 4A, on (1) Perini Corporation, (2) Sverdrup & Parcel and Associates, Inc., (3) Modern Continental Construction Co., Inc., (4) J.F. White Contracting Company, (5) Morrison Knudsen Corporation, and (6) Mergentime Corporation. All of these parties, in addition to Grace, have entered into Standstill Agreements with the City with respect to contamination at the Russell Field Property.

Acton and Cambridge have a strong interest in continuing to utilize the professional services of Anderson & Kreiger, LLP, in these matters because:

1. Acton and Cambridge separately selected this Firm to represent them because of this Firm's specialized knowledge and expertise in environmental and municipal matters pertinent to the legal issues involved in their separate, respective matters.
2. Lawyers at this Firm have had long-standing involvement in the legal representation of Acton and Cambridge, including such representation relating to Grace matters. For example, I have represented Acton in various matters (including matters pertaining to Grace) since 1978 (while at Palmer & Dodge) and since 1985 with this Firm. Similarly, Jeff and I have represented Cambridge in various environmental matters (including matters pertaining to Grace) since 1998.
3. During this time, lawyers at this Firm have built an institutional knowledge of Acton and Cambridge and a particularized knowledge of their separate legal issues involving Grace, which could only be re-created at considerable expense to Acton and Cambridge.
4. Because of the initiation of Grace's Chapter 11 Proceedings, Acton and Cambridge each retained separate bankruptcy counsel to advise them with respect to bankruptcy matters involving Grace.

We are mindful of the provisions of M.G.L. c. 268A, § 17, which provides in part as follows (emphasis added):

Section 17. (a) No municipal employee shall, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the city or town or municipal agency in relation to any particular matter in which the same city or town is a party or has a direct and substantial interest.

(b) No person shall knowingly, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly give, promise or offer such compensation.

(c) No municipal employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the city or town or municipal agency in prosecuting any claim against the same city or town, or as agent or attorney for

anyone in connection with any particular matter in which the same city or town is a party or has a direct and substantial interest.

Whoever violates any provision of this section shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

A special municipal employee shall be subject to paragraphs (a) and (c) only in relation to a particular matter (a) in which he has at any time participated as a municipal employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving. Clause (c) of the preceding sentence shall not apply in the case of a special municipal employee who serves on no more than sixty days during any period of three hundred and sixty-five consecutive days.

Acton's and Cambridge's underlying matters are separate and distinct legal matters (involving the legality of Acton's sewer betterment assessment on the one hand and the alleged contamination of Cambridge's Russell Field Property on the other) and do not involve the same "particular matter" within the meaning of Section 17. The City's underlying claims and the Town's underlying claims are completely unrelated factually and legally. They pertain to different properties in different municipalities; they arise out of different sets of facts; and they involve different legal issues. Accordingly, Anderson & Kreiger LLP's ongoing representation of Acton and Cambridge on these separate, unrelated matters does not implicate Section 17.

If and to the extent the pendency of Acton's and Cambridge's Proofs of Claim in Grace's Chapter 11 Proceedings are pending in the same "particular matter" within the meaning of Section 17,<sup>5</sup> Acton and Cambridge have engaged separate bankruptcy counsel to present those claims and advise them, separately, with respect to the bankruptcy issues pertaining thereto.

To the extent bankruptcy counsel requires information regarding the facts and/or law pertaining to the underlying claims, Acton and Cambridge have instructed Anderson & Kreiger

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<sup>5</sup> See Conflict of Interest Opinion No. EC-COI-79-100 ("A bankruptcy proceeding is a "particular matter" as that term is defined in s. 1(k) ...."). This Advisory Opinion is distinguishable from the present situation because, among other things, (1) the state employee was proposing to prepare reports and testify in various bankruptcy proceedings "to estimate the fair market value of some nursing homes which have filed for bankruptcy proceedings," (2) the State was expected to intervene as a party in those proceedings, and (3) it appears, significantly, that the reports/testimony would likely be directly related (and potentially adverse) to the State's interests in those proceedings.

to cooperate with bankruptcy counsel and provide that information to ensure that their respective underlying claims are not prejudiced by bankruptcy counsel's comparative unfamiliarity with the underlying facts and law as they relate to the parallel bankruptcy proceeding. Without limitation, Acton and Cambridge have asked Anderson & Kreiger LLP to move to appear *pro hac vice* in the Grace bankruptcy hearings, and to assist bankruptcy counsel with such facts and law if and as needed. By protecting the interests of Acton and Cambridge in the separate, unrelated underlying matters in this manner, we do not consider that our separate representation the underlying matters has been transformed into the same particular matter for purposes of Section 17. We ask that the Board concur with this conclusion.

In this context, we note that the consolidated Bankruptcy Court proceedings are in the nature of a reorganization, not a liquidation. They involve some 62 affiliated entities having significant net worth. They appear to have been initiated as a litigation management system because of a series of unrelated asbestos-related bodily injury claims. There is no reason to believe that Acton's or Cambridge's separate and unrelated claims, either alone or in the aggregate, would have any material bearing on Grace's financial position in the Chapter 11 Proceedings or on Grace's ability to satisfy these claims. Acton and Cambridge are not competing against each other for a limited set of resources in a Chapter 13 liquidation proceeding. Federal law establishes the relative priorities of Acton's and Cambridge's claims in the Chapter 11 Proceedings.

In these circumstances, we believe that the State Ethics Act would not be interpreted in an unduly restrictive way so as to deprive municipalities of the benefits of their long-standing attorney-client relationships, particularly where the municipalities have retained separate counsel specifically to advise them as to the bankruptcy issues. Rather, we believe that the State Ethics Act would be interpreted, consistent with its purpose, to allow Acton and Cambridge to continue to protect their interests in their separate underlying matters without prejudice by virtue of the ongoing Chapter 11 Proceedings. In this way, we believe that representation of the Town and the City have been structured to comply with Court precedents<sup>6</sup> and State Ethics Commission's Conflict of Interest Opinions.<sup>7</sup>

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<sup>6</sup> See Town of Edgartown v. State Ethics Commission, 391 Mass. 83 (1984) (an attorney cannot simultaneously represent both the Town of Edgartown and private parties to defend their interests on common issues of liability in the same Indian land claim case pending in Federal court (Chappaquiddick Tribe v. Watt) except 'as provided by law for the proper discharge of official duties.'" "[A] ruling that Mr. van Gestel cannot be attorney for Edgartown and private clients in the land claim case is not a ruling that he cannot be lead counsel for parties who are represented by different attorneys. The appointment of lead counsel does not result in substituting an attorney for the attorneys chosen by the parties, nor does it raise the concerns about actual, potential, or apparent conflicts that G.L. c. 268A, was designed to protect.")

<sup>7</sup> See Conflict of Interest Opinion No. EC-COI-86-16 (While an attorney could not represent parties other than the Town in the Chappaquiddick Tribe case, the attorney could represent the other parties in different, but similar, lawsuits brought by two different tribes - even though on appeal from the lower court's dismissal of all such

If you have any question, please let me know.

Sincerely,



Stephen D. Anderson  
[sanderson@andersonkreiger.com](mailto:sanderson@andersonkreiger.com)

### **DETERMINATION**

The Acton Board of Selectmen has determined that (a) Anderson & Kreiger LLP's appearance *pro hac vice* for the Town of Acton in the Grace Bankruptcy Court proceedings is necessary for the proper discharge of your official duties as Town Counsel, (b) the interest of the Town in the Grace proceedings requires your participation in the upcoming hearing and otherwise to provide assistance to bankruptcy counsel as to matters of Massachusetts sewer betterment law, (c) your firm's concurrent analogous representation of Acton and Cambridge are in no way inconsistent and do not involve the same "particular matter" within the meaning of Section 17 (particularly as both the Town and the City have separate bankruptcy counsel specifically to advise them as to matters involving the Grace bankruptcy), (d) the foregoing circumstances are not so substantial as to be deemed likely to affect the integrity of the services which the Town may expect from Anderson & Kreiger LLP as to sewer betterment matters involving Grace (or any other person), and (e) these circumstances should not cause a reasonable person, having knowledge of the relevant circumstances, to conclude that Cambridge can improperly influence us or unduly enjoy our favor in the performance of our official duties for

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cases the Court of Appeals had assigned the cases same docket number and had requested that the attorneys in all of the cases file a single brief, rather than five briefs. The Commission noted that each of the cases involved different parties, land areas, facts and standing issues and, therefore, were "separate particular matters" (that were consolidated by the Appeals Court for briefing)); Conflict of Interest Opinion No. EC-COI-85-73 (An attorney could represent both the Massachusetts Attorney General and a certain Committee, which the Attorney General had joined, in the Manville bankruptcy proceeding. The Commission concluded that such dual representation was "in the proper discharge of your official duties and exempt from G.L. c. 268A, § 4" because (1) the Attorney General had "determined that the interests of the commonwealth in the Manville proceedings requires [the attorney's] assistance to the Committee," and (2) "the purpose of [the attorney's] employment by the Attorney General cannot be achieved without [the attorney's] concurrent representation of the Committee."

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Acton, or that we are likely to act or fail to act for Acton as a result of rank, position or undue influence by Cambridge.

TOWN OF ACTON,  
By its Board of Selectmen,

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F. Dore' Hunter, Chairman

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Peter K. Ashton

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William H. Shupert, III

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Walter M. Foster

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Robert A. Johnson, Clerk

Enclosures

cc: Jeffrey Roelofs, Esq.

Acton/grace(sewer)/l/ethics1 A.wpd